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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

KIMBELL FOODS, INC., ET AL

REPLY TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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(I)

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QUESTION PRESENTED

Whether a contractual lien duly perfect-
ed in accordance with state law may be de-
feated by a subsequent contractual lien in
favor of an agency of the federal govern-
ment.

STATEMENT

On or about August 4, 1966 O K Super Ma-
rkets, Inc. granted to Kimbell Foods, Inc.
a security interest in certain equipment,
goods, wares and merchandise to secure a
promissory note from Kimbell Foods, Inc.
In connection therewith a financing state-
ment was duly filed with the Secretary of
State of Texas on September 2, 1966 along
with a copy of the underlying security ag-
reement and a list of the collateral.

On April 17, 1968 and November 7, 1968
O K Super Markets, Inc. executed addition-
al security agreements and financing stat-
ements in favor of Kimbell Foods, Inc.
which were cumulative of each other and

(1)

were in addition to an extension of the security agreement and financing statement dated August 4, 1966. These security agreements with attached lists of collateral and financing statements for each were also duly filed with the Secretary of State of Texas on April 22, 1968 and November 21, 1968 respectively.

Each of the security agreements executed by O K Super Markets, Inc. in favor of Kimbell Foods, Inc. provided that the security interest granted was to secure the therein-described promissory notes and in addition was also given to secure payment of all other indebtedness at any time thereafter owing by O K Super Markets, Inc. to Kimbell Foods, Inc.

On February 12, 1969 O K Super Markets, Inc. executed in favor of Republic National Bank of Dallas a security agreement and financing statement providing for a security interest in all of the O K Super Markets, Inc.'s goods, inventory, fixtures and equipment then existing or thereafter acquired. On the same date Republic National Bank loaned O K Super Markets, Inc. \$300,000.00 which loan was 90% guaranteed by the Small Business Administration. Part of the proceeds of such loan were used to pay Kimbell Foods, Inc. a remaining balance due on a promissory note owing to Kimbell Foods, Inc. However, there still remained an amount of \$18,390.93 owing to Kimbell Foods, Inc. by O K Super Markets, Inc. upon an open account indebtedness, such indebtedness having been accrued for merchandise sold to O K Super Markets, Inc. as of February 12, 1969.

No termination statement was filed by Kimbell Foods, Inc. as to any of the

financing statements described above nor was any requested of Kimbell Foods, Inc.

On or about February 18, 1969 a financing statement was filed with the Secretary of State of Texas naming O K Super Markets, Inc. as debtor and Republic National Bank of Dallas as secured party. Said financing statement provided for a security interest in all of the debtor's goods, inventory, fixtures and equipment then existing or thereafter acquired. The face of the financing statement did not indicate in any manner the participation by the Small Business Administration nor were any other writings filed.

On January 15, 1971 Kimbell Foods, Inc. filed suit against O K Super Markets, Inc. in the 96th District Court of Tarrant County, Texas for the net amount of \$18,258.57 principal, plus costs and attorneys' fees and joined Republic National Bank as a defendant. Republic National Bank was thereafter removed as a defendant and the cause as to it was transferred to the District Courts of Dallas County, Texas.

On or about February 3, 1971 the Small Business Administration of the United States of America paid to Republic National Bank of Dallas 90% of O K Super Markets, Inc.'s indebtedness to the Republic National Bank of Dallas which was in the amount of \$252,331.93 and was assigned a proportionate interest in the security interest held by Republic National Bank of Dallas in the property of O K Super Markets, Inc. On or about January 21, 1971 a financing statement was filed with the Secretary of State of Texas by the Small Business Administration reflecting the assignment set

forth above.

On or about February 3, 1971 Republic National Bank and O K Super Markets, Inc. entered into an agreement approved as to form and substance by Kimbell Foods, Inc. and the Small Business Administration whereby collateral covered by the security agreement and financing statements of Kimbell Foods, Inc. was sold and the proceeds of such sale were to be held in escrow by Republic National Bank to be paid over to the party or parties entitled to such proceeds after appropriate determination by court proceedings.

On February 4, 1972 a judgment was entered in the 96th District Court of Tarrant County, Texas for Kimbell Foods, Inc. against O K Super Markets, Inc. granting judgment to Kimbell Foods, Inc. on its claims against O K Super Markets, Inc.

On or about May 4, 1972 Kimbell Foods, Inc. filed an original complaint in the United States District Court for the Northern District of Texas, Dallas Division against Republic National Bank of Dallas and United States of America, defendants, requesting that the court find Kimbell Foods, Inc.'s claim to the proceeds of the property of O K Super Markets, Inc. sold pursuant to the agreement of February 3, 1971 prior and superior to the claims asserted by the defendants.

On July 15, 1974 the case went to trial and on October 1, 1975 a judgment was filed ordering that Kimbell Foods, Inc. was not entitled to any portion of the sum held in escrow by Republic National Bank of Dallas pursuant to the agreement of February 3, 1971 and denying the relief sought by Kimbell Foods, Inc. against

Republic National Bank of Dallas and the United States of America.

The Court of Appeals reversed the holding of the District Court rejecting the choateness doctrine adopted by the District Court in determining the priority of conflicting security interests between contractual lenders in the private sector and agencies of the federal government engaged in commercial lending.

REASONS FOR DENYING THE PETITION

In urging a uniform approach for determining the priorities of competing liens in cases involving the federal government, petitioner commits a sin of omission in failing to distinguish between those cases involving liens which vary significantly from state to state and those cases involving liens for which a uniform national means of resolution already exists.

In illumination of its premise that the choateness doctrine should be applicable to competing liens in situations involving the federal government, petitioner presents cases where the federal lien was invariably founded upon expressed statutory authority ascribing priority to the federal lien in relation to competing non-federal liens. Moreover, the competing non-federal liens in each such instance were of a nature that varies from state to state, such as mechanic's and materialman's liens.

The case at hand is clearly distinguishable in that it involved the resolution of conflicting security interests between contractual lenders, each of which had sought to protect their security interests in accordance with state law patterned after

the Uniform Commercial Code.

The Court of Appeals has formulated a well reasoned approach for the resolution of competing security interests between contractual lenders in the private sector and agencies of the federal government engaged in commercial lending. As was recognized in Chicago Title Insurance Company, et al v. Sherred Village Associates, 568 F. 2d 217, 222 (1st Cir., Jan. 5, 1978), the application of the Uniform Commercial Code to competing privately-held security interests was an admirable device since "the Uniform Commercial Code is of general nationwide application with no quixotic parochial variations".

The Uniform Commercial Code is designed to promote and stabilize interstate commerce by providing a nationally uniform and consistent codification of accepted commercial principles. All states, with the exception of Louisiana, have adopted the Uniform Commercial Code, and Article 9 of the Uniform Commercial Code is in effect on a nationwide basis without any material alterations or modifications.

The application of Article 9 of the Uniform Commercial Code to situations such as the case at bar provides a proven, accepted, and equitable means of uniformly resolving such conflicts without prejudice to any segment of the national lending sector.

Under the approach taken by the Court of Appeals, the United States is able to rely upon a uniform policy governing priorities between competing lien creditors, and when engaging in commercial lending through any of its agencies, the federal government is as able as any other commer-

cial lender to evaluate its credit risks prior to making loans.

To reject the application of Article 9 of the Uniform Commercial Code in instances such as this would thwart the national policies underlying the Uniform Commercial Code and would be a repudiation of the legislative wills of the peoples of all states which have adopted Article 9 of the Uniform Commercial Code.

A second and equally compelling reason exists for rejecting the petitioner's petition for a writ of certiorari. If the approach to future similar situations espoused by petitioner were applied, it is highly unlikely that any prior private creditor could prevail against the United States unless the amounts due and owing to that private creditor were first reduced to judgment.

It is respectfully submitted that if private lenders having duly perfected their security interests under the Uniform Commercial Code were faced with the prospect of having their security defeated by a subsequent contractual lien acquired by an agency of the federal government, then lending activities in the private sector of the economy would be drastically curtailed resulting in a significant diminishment of funds available to small entrepreneurs.

Funding from the private sector is absolutely essential to the growth and well being of small enterprises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1978.